(2)

No. 90-807

In The
Supreme Court of the United States
October Term, 1990

In re: WILLIAM M. KUNSTLER,
BARRY NAKELL, LEWIS PITTS,
Petitioners,

ROBESON DEFENSE COMMITTEE, *et al.*,
Plaintiffs,

v.

JOE FREEMAN BRITT, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* and BRIEF *AMICUS CURIAE* OF NATIONAL COUNCIL OF CHURCHES OF CHRIST, *et al.* IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF NATIONAL COUNCIL OF CHURCHES OF CHRIST, *ET AL.* IN SUPPORT OF PETITIONERS

Petitioners and Respondents Hubert Stone and Robeson County have consented to the filing of this brief *amicus curiae*. Respondents Joe Freeman Britt, Richard Townsend, Lee Edward Sampson, Lacy Thornburg, Robert Morgan, James Bowman, James G. Martin, SBI Doe I, SBI Doe II, SBI Doe III, Deputy Sheriff Doe I, Deputy Sheriff Doe II, Deputy Sheriff Doe III, Deputy Sheriff Doe IV, Deputy Sheriff Doe V, DA Doe I, DA Doe II, and DA Doe III, through their counsel of record, David Roy Blackwell, neither opposed nor consented to the filing of this brief amicus curiae.

Pursuant to Rule 37 of the Rules of the Supreme Court of the United States, amici curiae[1] respectfully move this Court to grant permission to file this brief amicus curiae. The brief amicus curiae argues broadly that, as applied below by the U.S. Court of Appeals for the Fourth Circuit, Rule 11 contravenes both the spirit and letter of the civil rights statutes pursuant to which the instant case was brought. Because this is a perspective not addressed in depth by the parties, amici believe that the Court and

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[1] Amici curiae herein consist of the following organizations: National Council of Churches of Christ, Southern Christian Leadership Conference, National Catholic Conference for Interracial Justice, Southern Organizing Committee for Economic and Social Justice, Center for Democratic Renewal, Clergy and Laity Concerned, Federation of Southern Cooperatives/Land Assistance Fund, Gulf Coast Tenant Organization, Highlander Research and Education Center, Institute for Southern Studies, North Carolinians Against Racist and Religious Violence, People's Institute for Survival and Beyond, Southern Rainbow Education Fund and Southeast Center for Justice.

the interests of justice will be served by consideration of this brief amicus curiae.

As strong advocates of social justice, amici curiae believe that open access to the civil court system for litigants challenging ill-conceived or illegal governmental activity is central to the health and survival of the democratic system of government.[2] The ruling below -- specifically, the expansive interpretation given by the district court to the sanctions provisions on which it relied -- stands as a potentially serious barrier preventing access to the courts for citizens who seek to vindicate their constitutional rights.

Since the enactment of the Civil Rights Act of 1871, it has been the concerted policy of Congress to encourage access to the federal courts by individuals deprived, under color of law, of their constitutional rights. Monroe v. Pape, 365 U.S. 167, 171-187 (1960). As the brief amicus curiae will demonstrate, civil rights litigants are being disproportionately targeted by Rule 11, and as a consequence access to the courts is being restricted.

Furthermore, the utilization of Rule 11 to award attorney's fees in the instant case alters the determination of the allocation of attorney's fees as mandated by the Civil Rights Attorney's Fees Awards Act of 1976. Such a result violates the Rules Enabling Act, 28 U.S.C. Sec. 2072, which states that a procedural rule may not abridge, enlarge or modify substantive law.

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[2]The more specific interests of each of the amici curiae are set forth in Appendix A.

CONCLUSION

Because of the significance of this case to meaningful access to the Federal Courts to vindicate constitutional rights, amici curiae respectfully urge this Court to grant their motion for leave to file this brief amicus curiae.

Respectfully submitted,

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December 19, 1990

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BRIEF *AMICUS CURIAE* OF NATIONAL COUNCIL OF CHURCHES OF CHRIST, *et al.* IN SUPPORT OF PETITIONERS

QUESTIONS PRESENTED

I. Did the district court impose Rule 11 sanctions against Petitioners in derogation of Congressional intent to encourage private civil rights litigants to act as "private attorneys general" and to use the civil rights statutes as a safeguard against governmental corruption?

II. In light of the prohibition in the Rules Enabling Act that precludes this Court from issuing rules that "abridge, enlarge, or modify any substantive right," may a district court employ Rule 11 of the Federal Rules of Civil Procedure in such a way as to alter the fee-shifting balance struck by Congress in the Civil Rights Attorney's Fees Act?

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BRIEF AMICUS CURIAE OF NATIONAL COUNCIL OF CHURCHES OF CHRIST, *et al.* IN SUPPORT OF PETITIONERS

INTEREST OF AMICI CURIAE

Amici curiae are religious organizations and human rights groups committed to working for a more just, equal and humane society through peaceful and democratic means. As strong advocates of social justice, amici curiae believe that open access to the civil court system for

litigants challenging ill-conceived or illegal governmental activity is central to the health and survival of the democratic system of government. The ruling below--specifically, the impermissible application of Rule 11 sanctions to the petitioners herein--stands as a potentially serious barrier preventing access to the courts for citizens who seek to vindicate their constitutional rights.

Because of the significance of this case to meaningful access to the federal judiciary by victims of constitutional violations, amici respectfully urge this Court to grant Petitioner's petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Fourth Circuit.

The more specific interests of each of the amici curiae are set forth in Appendix A.

STATEMENT OF THE CASE

On February 1, 1988, in an act of avowed desperation, Timothy Jacobs and Eddie Hatcher, held 20 hostages in the offices of a local newspaper. Jacobs and Hatcher, both Native Americans, sought to focus attention on entrenched corruption, complicity with drug trafficking and racial discrimination within Robeson County officialdom. In return for the release of the hostages, the Governor's Office agreed to appoint a special Task Force to investigate county authorities, including the Sheriff's Office and the District Attorney's Office. Jacobs and Hatcher surrendered to the FBI and were subsequently indicted on federal conspiracy, weapons, and hostage-taking charges.

The desperate conduct of Jacobs and Hatcher is a paradigm for what happens when legal avenues of redress

appear closed to people who seek justice. When cries for an end to corruption and discrimination were repeatedly ignored by state and federal authorities, Robeson County became a breeding ground for cynicism. The unresponsive body politic engendered frustration, anger and, ultimately, an act of desperation by two young men. Recognizing this pattern, a federal jury acquitted Jacobs and Hatcher of all charges.[1] But the official complicity with corruption began anew.

After the acquittal, Hatcher joined other citizens of Robeson County in a petition drive to remove the Sheriff. Whereupon, under the guise of an investigation initiated by the District Attorney to determine if others were involved in the conspiracy to take hostages, a campaign of intimidation and harassment of those involved in the petition drive began. The record below contains considerable evidence that agents of the State Bureau of Investigation (SBI), who were carrying out the putative "conspiracy" investigation, engaged in interrogation and surveillance of supporters of the petition drive in a manner designed to intimidate them. Affidavits filed by plaintiffs indicate that this harrassment did indeed have the effect of frightening people away from the petition drive. Other evidence demonstrates that officials in the Sheriff's office exerted pressure on the public school system to deny Plaintiff Robeson Defense Committee access to school facilities for meetings.

Furthermore, plaintiffs reasonably believed that defendants initiated state criminal prosecutions (on charges

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[1]Petitioner Lewis Pitts was one of Jacobs' attorneys. Hatcher was represented by Petitioners William Kunstler and Barry Nakell.

arising out of the same events for which plaintiffs Hatcher and Jacobs had secured a federal acquittal) in bad faith. Ample evidence also existed of a coordinated effort to interfere with Timothy Jacob's Sixth Amendment right to counsel; e.g., a taped phone call to Jacob's mother recorded an SBI agent urging Ms. Jacobs to advise her son to waive extradition, plead guilty, testify against Hatcher, terminate petitioner Pitts and hire a local attorney.

Meanwhile, Governor Martin's Task Force appointed to investigate corruption stalled, claiming it lacked full investigative authority. Citing "politics" as the basis of its determination, the Attorney General's office also refused to become involved, despite its acknowledgment of the seriousness of the problems in Robeson County. As a last resort, plaintiffs decided to file a civil rights action, alleging, inter alia, interference, under color of state law, with plaintiffs' First Amendment rights to petition and organize and plaintiffs Hatcher and Jacobs' Sixth Amendment right to counsel.

The instant action was filed on January 31, 1989. The principal relief sought by plaintiffs was injunctive. In particular, plaintiffs sought (1) an injunction against the pending state criminal prosecutions, (2) an injunction against the campaign of harassment disguised as a "conspiracy" investigation and (3) an injunction against continued interference with the attorney-client relationship established by Jacobs and Hatcher.

Plaintiffs immediately sought to begin discovery by taking the deposition of a witness crucial to establishing the key First and Sixth Amendment violations. However, the district court stayed discovery. While discovery was blocked, certain changes in circumstance rendered the principal claims for injunctive relief moot. Thus, before

plaintiffs had an opportunity to present the requisite admissible evidence to justify a TRO to enjoin the state prosecutions, Jacobs negotiated a guilty plea. In the process, the state appointed an attorney other than petitioner Pitts to represent Jacobs in the plea bargaining, thereby destroying both the joint defense of Hatcher and Jacobs and the representation of Jacobs by petitioner Pitts. Moreover, having succeeded in crushing the petition drive, the SBI had terminated all overtly intimidating activity with respect to the "conspiracy" investigation. Of the injunctive relief sought, the only remaining issue was Hatcher's pending state prosecution.

The damage claims, of course, also remained. However, a deliberate and professional decision was reached that the time expended on damage claims would not warrant the extensive expenditure of public-interest resources in light of the limited prospective monetary liability. In essence, the plaintiffs voluntarily dismissed the case because the defendants had accomplished the very deprivation of rights which the plaintiffs had sought to enjoin. Plaintiffs, in consultation with their attorneys (petitioners), were clearly entitled to decide that the pursuit of the damage claims alone did not warrant continuation of the suit, particularly given the pending prosecution of Hatcher and the need for resources for that.

The district court granted plaintiffs a voluntary dismissal, unopposed by defendants, pursuant to Fed. R. Civ. P. 41(a)(2) on May 2, 1989. Five months later, the district court granted defendants' motion for Rule 11 sanctions based upon the amended complaint. The court levied a sanction of over $122,000 against plaintiffs' attorneys, petitioners herein. The Court of Appeals upheld the Rule 11 sanction but remanded for a redetermination

of an "appropriate" amount.

The sanction herein, by intention or not, sends the message to civil rights plaintiffs and attorneys that the judiciary is no longer a forum for the vindication of civil rights. Indeed, this sanction embodies the abdication by the judiciary of its role in the constitutional balance of powers to register and respond to individual grievances resulting from executive abuse of power. With this sanction, the judiciary has, in effect, slammed the door in the faces of those who sought justice at its entrance. Plaintiffs' legitimate attempts to resolve their grievances were blocked at every pass - the petition drive was subverted and appeals to executive authority fell on deaf ears. Finally, plaintiffs turned to the courts for vindication of their rights. Although plaintiffs did not ultimately prevail, the complaint was entirely warranted, both factually and legally, and was filed for the sole purpose of securing the vindication of plaintiffs' constitutional rights.

SUMMARY OF THE ARGUMENT

No one quarrels with the stated goals of Rule 11 to reduce abuse of the judiciary and improve the quality of litigation. Fed. R. Civ. P. 11 advisory committee note. But one suspects that the Rule 11 sanction in this case was levied for a different reason--because the district court disapproved of the idea of litigation as a vehicle for redress of governmental abuses of power. Notwithstanding the court's claim that the complaint lacked adequate inquiry into law and fact, neither of these issues is at the

heart of this sanction.[2]

The true jurisprudential debate underlying this case concerns the definition of the proper role of the civil justice system. The two principal parties to the debate are (a) those who view courts as mediators of strictly private, typically contractual or tortious, disputes and (b) those who look to the judiciary as a means of vindicating the rights of individuals and groups against governmental misconduct. The debate is not new. The Judiciary has long struggled with the question of the appropriate exercise of its own authority. That very struggle, moreover, has redounded to the benefit of society by striking a feasible balance between the competing models.

However, the debate has acquired a new urgency due to the expanded and improper use of Rule 11 sanctions by members of the judiciary who would restrict access to the

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[2] Indeed, the district court's distaste for a reformist role for the courts is evident; "The parties have attempted to lead this court into a broader inquiry into alleged corruption in Robeson County in general, and in Robeson County and North Carolina law enforcement in particular. ... Even if it were later determined that the allegations raised in those complaints were true, this court finds that the conduct of plaintiffs' counsel at the time of the filing of the original and the amended complaint is nonetheless sanctionable." Robeson Defense Committee v. Britt, No. 89-06-Civ-3-8, slip op. at 21 (E.D.N.C. Sept. 29, 1989). The Panel evinces a similar disdain for the concept of courts as arbiters of justice; it refers to "allegations of abusive behavior against Blacks and Indians" as "irrelevant" and proceeds to find the presence of such "irrelevant allegations" as evidence that the complaint lacked adequate factual foundation. In Re: Kunstler, No. 89-2815, slip op. at 15,16 (4th Cir. Sept. 18, 1990).

courts. Rule 11 is a potent weapon, increasingly used to punish plaintiffs and attorneys who seek reform through litigation.[3] It hangs like a Damoclean sword to deter those contemplating public interest and civil rights litigation.

Amici actively subscribe to the view of the courts as guardians and arbiters of both individual and public justice. The district court and the Panel may disagree, but by upholding the sanction in this case the Panel does not merely register a legitimate preference for one jurisprudential model over another. By upholding the sanction herein, the Panel contravenes clear Congressional policy mandating open access to the courts for vindication of claims of governmental malfeasance.

There exists a discernible and, in our opinion, foreboding trend in the federal judiciary to restrict access to the courts. Rule 11 has been applied disproportionately against civil rights and public interest litigants in an effort

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[3] A study of the reported Rule 11 decisions between 1983 and 1985 reveal that although only 7.6% of the civil filings in those years were civil rights cases, 22.3% of the Rule 11 decisions involve civil rights claims. Nelken, Sanctions Under Amended Rule 11 - Some "Chilling" Problems in the Struggle Between Compensation and Punishment, 74 Georgetown L. Rev. 1313, 1327 (1986). In addition, the vast majority of Rule 11 decisions were directed toward plaintiffs and their attorneys. Id. Another study which examined all Rule 11 activity in the Third Circuit between July 1, 1987 and June 30, 1988 determined that civil rights plaintiffs and/or their attorneys were sanctioned "at a rate (8/17 or 47.1%) that is considerably higher than the rate (6/71 or 8.45%) for plaintiffs in non-civil rights cases." American Judicature Society, Rule 11 in Transition: The Report of the Third Circuit Task Force on Federal Rule of Civil Procedure 11, at 69 (1989).

to effectuate this policy. However, Rule 11 may not be thus employed, where, as in the civil rights statute pursuant to which the instant case was brought, Congress has mandated that the federal courts exercise broad remedial powers to redress injustice.

Further, the application of Rule 11 to civil rights cases raises serious questions under the Rules Enabling Act, 28 U.S.C. Sec 2072. By enacting the Civil Rights Attorney's Fees Award Act, 42 U.S.C. Sec. 1988, Congress created substantive rights. Pursuant to Rule 11, the district court awarded the respondents herein attorneys' fees and expenses, thereby altering the fee-shifting balance struck by Congress in the Civil Rights Attorney's fees Award Act. But substantive rights may not be abridged, enlarged, or modified by the Federal Rules. Rules Enabling Act, 28 U.S.C. Sec 2072.

ARGUMENT

I. Application of Rule 11 in this case is antithetical to civil rights statutes.

This Court has repeatedly emphasized that Congress expressly intended that a plaintiff seeking relief in a civil rights lawsuit "does so not for himself alone but also as a 'private attorney general', vindicating a policy that Congress considered of the highest priority." Newman v. Piggie Park Enters., 390 U.S. 400, 402 (1968); see also, Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 418 (1977). Further, this Court has recognized that "[t]he very purpose of Sec. 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights--to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial.'" Mitchum

v. Foster, 407 U.S. 225, 242 (1972) (quoting Ex parte Virginia, 100 U.S. 339, 346 (1880)).

A review of the legislative history of Sec. 1 of the Civil Rights Act of 1871, the precursor to 42 U.S.C. Sec. 1983, demonstrates a clear Congressional intent to "throw open the doors of the United States courts" to individuals deprived of their constitutional rights. Patsy v. Florida Board of Regents, 457 U.S. 496, 504 (1982) (quoting Cong. Globe, 42d Cong., 1st Sess., 376 (1871)(remarks of Rep. Lowe)). As was noted in Owen v. City of Independence, 445 U.S. 622, 635 (1980), the congressional debates surrounding the passage of the forerunner of Sec. 1983 confirm the expansive sweep and requisite broad construction of the statute. Representative Shellabarger, the author and manager of the bill in the House, explained his view of the Act's broad remedy; "This act is remedial, and in aid of the preservation of human liberty and human rights. All statutes and constitutional provisions authorizing such statutes are liberally and beneficently construed.... [T]he largest latitude consistent with the words employed is uniformly given in construing such statutes and constitutional provisions as are meant to protect and defend and give remedies for their wrongs to all the people." Cong. Globe, 42d Cong., 1st Sess., App. 68 (1871).[4]

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[4] In fact, it was precisely the breadth of the remedy about which the opponents of the bill were most vociferous; "[This section's] whole effect is to give to the Federal Judiciary that which now does not belong to it.... It authorizes any person who is deprived of any right, privilege, or immunity secured to him by the Constitution of the United States, to bring an action against the wrong-doer in the Federal courts.... The deprivation may be of the slightest conceivable character." Id., App. 216.

The Panel's decision upholding the instant sanction against petitioners will inevitably discourage petitioners and other civil rights attorneys from accepting civil rights cases on behalf of individuals deprived of their constitutional rights. Such a result is fundamentally incompatible with Congress' intention that courts "use the broadest and most effective remedies available to achieve the goals of our civil rights laws." Senate Report, at 2, U.S. Code Cong. & Admin. News 1976, p. 5910-11.

II. The Utilization of Rule 11 to Award Attorneys' Fees herein Constitutes a Violation of the Rules Enabling Act.

The Federal Rules of Civil Procedure are promulgated pursuant to the Rules Enabling Act, wherein Congress has delegated its authority to this Court to "prescribe general rules of practice and procedure" for cases in the U.S. district courts. 28 U.S.C. Sec. 2072. This delegation is limited, however, by the condition that "[s]uch rules shall not abridge, enlarge or modify any substantive right." Ibid.

Rule 11 was amended in 1983 to expand the power of judges to sanction litigants by permitting judges to make ad hoc decisions about whether to award attorney's fees and under what circumstances. Pursuant thereto, the district court ordered petitioners herein to pay all of the attorneys' fees and expenses of respondents. With no discernible consideration of the appropriateness of the sanction, the court simply shifted the fees.

However, by enacting the Civil Rights Attorney's Fees Act of 1976, 42 U.S.C. 1988, Congress reserved to itself the allocation of attorney's fees in civil rights cases. Congress enacted Sec. 1988 specifically to give an advantage to civil rights plaintiffs by spelling out the terms

and conditions under which attorney's fees would be awarded in civil rights litigation. The application of Rule 11 herein alters this congressionally prescribed allocation of civil rights attorney's fees. Such a result is forbidden by the Rules Enabling Act, 28 U.S.C. Sec. 2072, because provisions for civil rights attorney's fees involve substantive rights which may not be abridged, enlarged, or modified by the Federal Rules.

As Justice Brennan noted in Hensley v. Eckerhart, "[s]tatutory attorney's fee remedies such as those created by Sec. 1988 ... are far more like new causes of action tied to specific rights than like background procedural rules governing any and all litigation." Hensley v. Eckerhart, 461 U.S. 424, 443 n.2 (1983)(Brennan, J., concurring in part and dissenting in part). See also Marek v. Chesney, 473 U.S. 1, 35 (1985)(Brennan, J., dissenting)("The right to attorney's fees is 'substantive' under any reasonable definition of that term.") Sec. 1988 was designed to accomplish the substantive policy objective of compliance with the civil rights laws, by authorizing the district courts to award reasonable attorney's fees to prevailing parties in specified civil rights litigation.

With enactment of the Civil Rights Attorney's Fees Awards Act of 1976, Congress confirmed its conviction that fee awards are an essential component of the statutory structure enacted to promote the vindication of civil rights. "All of these civil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain." Senate Report, at 2, U.S. Code Cong. & Admin. News 1976, p. 5910. Congress enacted Sec. 1988 because it recognized that the vast majority of the victims of civil rights

violations cannot afford legal counsel and, absent provisions for attorney's fees, would be denied effective access to the judicial process. See City of Riverside v. Rivera, 477 U.S. 561, 576 (1986). "If the citizen does not have the resources, his day in court is denied him; the congressional policy which he seeks to assert and vindicate goes unvindicated; and the entire Nation, not just the individual citizen, suffers." 122 Cong. Rec. 33313 (1976)(remarks of Sen. Tunney).

Congress further expressed its solicitude for the role of the civil rights plaintiff by disapproving the award of attorney's fees to a prevailing defendant unless bad faith is evident.

> Such 'private attorneys general' should not be deterred from bringing good faith actions to vindicate the fundamental rights here involved by the prospect of having to pay their opponent's counsel fees should they lose. Richardson v. Hotel Corporation of America, 332 F.Supp. 519 (E.D. La. 1971), aff'd, 468 F.2d 951 (5th Cir. 1972) (A fee award to a defendant's employer was held unjustified where a claim of racial discrimination, though meritless, was made in good faith.) ... This bill thus deters frivolous suits by authorizing an award of attorneys' fees against a party shown to have litigated in 'bad faith'....

Senate Report, at 5, U.S. Code Cong. & Admin. News 1976, p. 5912.

With respect to statutes similar to Sec. 1988, this Court has likewise held that the award of fees to a successful defendant requires a higher standard of proof than that for

the prevailing plaintiff. Roadway Express, Inc. v. Piper, 447 U.S. 752, 762 (1980). Attorney's fees are routinely awarded prevailing civil rights plaintiffs, but prevailing defendants are rarely awarded fees and then only when the unsuccessful plaintiff's underlying claim is "frivolous, unreasonable, or groundless." Christiansburg, 434 U.S. at 422. This distinction advances the Congressional policy to remedy civil rights abuses. Accord Commissioner, I.N.S. v. Jean, 110 S.Ct. 2316 (1990)("[t]he government's general interest in protecting the federal fisc is subordinate to the specific statutory goals of encouraging private parties to vindicate their rights and 'curbing excessive regulation and the unreasonable exercise of Government authority'"). But the Panel reverses this policy by not only condoning the award of attorneys' fees to the non-prevailing defendants herein, but doing so without any finding of bad faith.[5]

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[5] The Panel found that the complaint was filed for an "improper purpose," a less stringent standard than "bad faith." But the finding of "improper purpose" was itself wholly unwarranted. The Panel wrongly infered from plaintiffs' Rule 41 voluntary dismissal that plaintiffs never intended to litigate the case and that it was thus filed for some other "improper purpose." In Re: Kunstler, No. 89-2815, slip op. at 26 (4th Cir. Sept. 18, 1990). However, one of the principal purposes of Fed. R. Civ. P. 41(a)(2) is to encourage plaintiffs to discontinue a claim when circumstances so warrant. Plaintiffs should not be punished for so utilizing Rule 41(a)(2). See, e.g., Larchmont Engineering, Inc. v. Toggenburg Ski Center, Inc., 444 F.2d 490, 491 (2nd Cir. 1971) ("After pretrial discovery revealed the weaknesses of its claims, Larchmont may well have decided in good faith to minimize litigation expense by foregoing its claims and by taking a voluntary dismissal. Such a move should not be discouraged by the threat of imposing attorney fees."); Arthur v. Starrett City Associates, 98 F.R.D. 500, 505 (E.D. New York, 1983) ("The burdens of lengthy litigation, changes in circumstance, and other effects of time may reasonably persuade

The Panel obliterates the statutory distinction and thereby undermines clear Congressional policy of solicitude for civil rights plaintiffs. By thus altering the congressionally prescribed allocation of civil-rights attorney's fees, the application of Rule 11 herein violates the Rules Enabling Act. Cf. Kaiser Aluminum & Chem. Co. v. Bonjorno, 110 S. Ct. 1570, 1576 (1990)("[T]he allocation of the costs accruing from litigation is a matter for the legislature, not the courts."); Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 444 (1987)("Congress meant to impose rigid controls on cost-shifting in federal courts.").

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a plaintiff to discontinue a claim he or she once believed valid and worth prosecuting. This option should exist without the penalty of the imposition of a defendant's litigation expenses."); Colombrito v. Kelly, 764 F.2d 122, 134 (2nd Cir. 1985) (where parties agreed to voluntary dismissal with prejudice, court held that it "would not want to discourage such a salutary disposition of litigation by threatening to award attorneys' fees if a plaintiff did not complete a trial.").

CONCLUSION

At the heart of the Rule 11 sanction in this case is a fundamental hostility to use of the civil justice system to vindicate civil liberties. The Panel's affirmation of the lower court's order ignores a long line of Supreme Court precedent condoning the concept of adjudication as an institution for interpreting and enforcing civil liberties. Indeed, as the Supreme Court observed nearly thirty years ago, litigation may be a form of political expression; "Groups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts.... And under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances." N.A.A.C.P. v. Button, 371 U.S. 415, 429 (1963). Specifically, the ruling flouts the statutory mandates of 42 U.S.C. Sec. 1983 and the clear intent of Congress to provide judicial remedies for civil rights abuses.

In order to further promote the vindication of civil rights, Congress enacted Sec. 1988. Congress determined therein that prevailing plaintiffs would ordinarily recover attorney's fees from the defendant, and a prevailing defendant ought not ordinarily recover such fees. Sec. 1988 instituted a decided bias in favor of civil rights plaintiffs. Plainly, Congress was making substantive policy choices. "Moreover, they are choices that are informed by an awareness of distributional inequalities--the effect of which is inevitably to prevent many defendants from recouping moneys spent on 'unnecessary legal expense.'" Burbank, Proposals to Amend Rule 68--Time to Abandon Ship, 19 U. Mich. J.L. Ref. 425, 436 (1986).

Rule 11, enacted to advance the policy of avoiding expense and delay, is indifferent to the inequities inherent in a dispute or to the values of the substantive civil rights laws. Imposing Rule 11 monetary sanctions in civil rights litigation redefines the relevant objectives and empowers judges to make policy decisions different from those reached by Congress. Sec. 1988 controls the allocation of attorney's fees in the instant case. Modification of that substantive law, pursuant to Rule 11, is a violation of the Rules Enabling Act.

The sanction herein, representing an assault on the remedial responsibilities of the civil justice system and a violation of the Rules Enabling Act, is impermissible and should be reversed.

Respectfully submitted,

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Dated: December 19, 1990

Counsel for Amici Curiae

APPENDIX

STATEMENTS OF INTEREST

1. The National Council of Churches of Christ

The National Council of Churches of Christ in the U.S.A. is a community of communions composed of 33 national religious bodies, Protestant and Eastern Orthodox, having an aggregate membership of more than 40 million adherents in the United States. It is governed by a board of some 260 members appointed by its member denominations in proportion to their size and support of the Council. The Council does not claim to speak for all of those adherents, but seeks to carry out the wishes of their representatives as expressed in the policies they adopt through the Governing Board.

NCCC has a history of witness on issues of social justice. More specifically, the Racial Justice Working Group (RJWG), convened by the NCCC, has long followed the community tensions and organizing efforts in Robeson County. RJWG fact-finding teams sent into the area documented a pattern of violence and racial oppression. NCCC is thus convinced that the case on which the sanctions were based was solidly grounded in fact. Further, we fear that, in this case and throughout the federal court system, Rule 11 is being used to penalize lawyers who aggressively pursue civil rights charges against public officials and institutions, with consequent erosion of the already limited rights of the poor, people of color and the politically disenfranchised.

2. Southern Christian Leadership Conference

This internationally renowned association, founded by

the late Dr. Martin Luther King, Jr., has chapters throughout the country. Their efforts are directed toward working for civil rights and the interests of poor and disenfranchised people, and with a special concern for world peace and the impact of excessive military spending on low-income communities.

3. National Catholic Conference for Interracial Justice

The National Catholic Conference for Interracial Justice (NCCIJ), founded in 1960 as an umbrella group for local Catholic Interracial Councils, is rooted in the traditions, aspirations and social teaching of the Catholic Church. The main focus of NCCIJ is the implementation of Catholic Church teachings on racial justice and promotion of the Church's vision of multi-cultural, multi-racial understanding, respect and collaboration for an inclusive church and society. As such, NCCIJ is interested in the underlying litigation because civil rights litigation is an integral aspect of the struggle to attain racial and social justice.

Open access to the courts for those citizen groups challenging abuse of power and violations of the civil rights of individuals and groups is an important aspect of our democratic and judicial system. NCCIJ is concerned that Rule 11 sanctions are being used, as in the case at bar, to punish plaintiffs and attorneys who seek reform and the vindication of civil rights through the courts.

4. Southern Organizing Committee for Economic and Social Justice

The Southern Organizing Committee for Economic and Social Justice (SOC) is a Southern-wide, multi-racial, multi-issue network of individuals working in local communities across the region against racism, war, and economic

injustice. SOC and its predecessor organizations, the Southern Conference Educational Fund (SCEF) and the Southern Conference for Human Welfare, have a fifty year history of supporting local grassroots movements fighting racism and injustice, and of opposing repression that threatens to crush these movements.

5. Center for Democratic Renewal

The Center for Democratic Renewal, headquartered in Atlanta, Georgia, is a national Clearinghouse known for efforts to counter hate group activity and bigoted violence through public education, community response, leadership training and research.

6. Clergy and Laity Concerned

Clergy and Laity Concerned is a national multi-race network of people that exists to build a movement for justice and peace by bringing moral, ethical, and religious values to bear on issues of human rights and racial and gender justice at home and abroad.

7. Federation of Southern Cooperatives/Land Assistance Fund

Located in Epes, Alabama, the Federation of Southern Cooperatives is a technical assistance, training, and advocacy organization for 20,000 low-income families organized into more than 100 co-op and credit unions in the rural South (it is a leading advocate for addressing problems of Black farmers who are losing their land at a rapid rate.) The community organizing and land retention advocacy efforts often rely on the courts as a last resort for its members in their search for economic justice.

8. Gulf Coast Tenant Organization

The Gulf Coast Tenant Organization, with its principal office in New Orleans, is a federation of organized groups of tenants in public and federally subsidized housing in roughly 40 communities in the states of Louisiana, Mississippi, and Alabama. The organization's activities seek full human rights for tenants, and public policies that meet the needs of poor people.

9. Highlander Research and Education Center

Located in New Market, Tennessee, this non-profit center conducts work on environmental issues, economic and social justice, and civil rights in Appalachia and the South (in the past year more than 2000 mostly low-income people from 45 states took part in its programs.)

10. Institute for Southern Studies

This entity, based in Durham, North Carolina, is a research, information, and organizing resource to grass-roots and community-based organizations, leaders, scholars, policy makers and others who are working to create lasting social and economic change in the South.

11. North Carolinians Against Racist and Religious Violence

This statewide organization based in Durham has worked for six years to develop a comprehensive response opposing the violence perpetrated by neo-Nazis and the Klu Klux Klan in North Carolina.

12. People's Institute for Survival and Beyond

The People's Institute for Survival and Beyond is an organization that conducts workshops and training sessions throughout the nation for people working for social justice in their communities while stressing work against racism and militarism, and knowledge of history and other peoples' cultures.

13. Southern Rainbow Education Fund

Located in Montgomery, Alabama, the Southern Rainbow Education Fund is a free-standing, multi-racial and multi-issue coalition dedicated to the principle that grassroots people can act on their behalf, as their own advocates.

14. Southeast Center for Justice

The Southeast Center for Justice is committed to accompanying the self-determination of the poor in the southeast toward a more just order. The Center works with people who seek to change social structures which cause or perpetuate exploitation and injustice.